

Application No. 10/675,820
Amendment dated February 28, 2006
Reply to Office Action of February 12, 2006

such, Applicant respectfully traverses the Examiner's rejection of independent claim 1 based on 35 U.S.C. § 102(e).

Independent claim 1 recites "said first and second portion being pivotal about an axis that passes through at least a portion of the pathway." However, Cauthen teaches an insertion instrument 10 of Figs. 1 and 2 having a handle 18 and a guide 20 extending therefrom pivotal about an articulating hinge 22. (Cauthen, page 2, paragraphs 33-34; Figs. 1 and 2). Furthermore, Cauthen teaches an insertion instrument 10 of Figs. 13 and 14 having a handle 18 with an associated guide 20 and a handle 37 with an associated guide 35 pivotal about articulating hinges 22 and 36, respectively. (Cauthen, pages 2-3, paragraph 37; Figs. 13 and 14). Handle 18 and guide 20 in Figs. 1 and 2, and handles 18 and 37 and associated guides 20 and 35, respectively, of Figs. 13 and 14 pivot about axes that lie outside the pathway leading to the disc space and adjacent vertebral bodies. (See, e.g., Cauthen, Figs. 1, 2, 13, and 14). Therefore, Cauthen does not teach or suggest a guard as recited in independent claim 1. As such, independent claim 1 is patentable over the Examiner's rejection, and claims 2-30 dependent from independent claim 1, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

The Examiner rejected claim 29 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Publication No. 2003/0023209 to Gruskin et al. Applicant submits that the rejection of claim 29 is rendered moot at least because it depends from an allowable independent claim, or claims dependent therefrom.

The Examiner rejected claim 30 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Publication No. 2003/0229401 to Mansourt et al. Applicant submits that the rejection of claim 30 is rendered moot at least because it depends from an allowable independent claim, or claims dependent therefrom.

In conclusion, Applicant submits that independent claim 1 is patentable and that dependent claims 2-30 dependent from independent claim 1, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

Application No. 10/675,820
Amendment dated February 28, 2006
Reply to Office Action of February 12, 2006

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: February 28, 2007

By: 

Thomas H. Martin
Registration No. 34,383

1557 Lake O'Pines Street, NE
Hartville, Ohio 44632
Telephone: (330) 877-0700
Facsimile: (330) 877-2030